APPENDIX A — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL FILED OCTOBER 19, 2001

No. 01-35554

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON PARALYZED VETERANS OF AMERICA,
an Oregon non-profit corporation,

Plaintiff,

and

KATHY STEWMON; TINA SMITH; KATHY BRADDY,

Plaintiffs-Appellants,

v.

REGAL CINEMAS, INC.,
a Tennessee corporation doing business in Oregon;
EASTGATE THEATRE, INC., d/b/a Act III Theater,

Defendants-Appellees.

BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE SUPPORTING
APPELLANTS AND URGING REVERSAL

Appendix A

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* * *

The Department of Justice has principal authority for administering the provisions of the ADA that govern the design and construction of new facilities. The Attorney General has the sole power to issue binding regulations to carry out those "new construction" provisions. See 42 U.S.C. 12186(b); see also 42 U.S.C. 12183(a)(1). And the Department of Justice is the only federal agency with authority to enforce Title III of the ADA, which includes the new construction requirements. See 42 U.S.C. 12188(b)(1)(B.)

* * * *

APPENDIX B — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS APPELLANT FILED JUNE 5, 2002

No. 02-3100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CINEMARK USA, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS APPELLANT

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Appendix B

* * *

The Department of Justice, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Those regulations must be "consistent with the minimum guidelines and requirements issued by the" Access Board. 42 U.S.C. 12186(c). But the Board is not required to approve the Department's standards, and the Board's guidelines do not themselves have the force of law. They merely set minimum guidelines for the Attorney General's regulations to follow. As the Board itself has recognized, the Attorney General is free to issue rules that "exceed the Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991).

* * * *

APPENDIX C — EXCERPTS FROM BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL FILED DECEMBER 16, 2002

No. 02-9034

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUSAN MEINEKER and SYBIL MCPHERSON,

Plaintiffs-Appellants,

v.

HOYTS CINEMAS CORPORATION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

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Appendix C

* * *

At any rate, the Fifth Circuit erred in assuming that the Access Board's post-1991 interpretation of Standard 4.33.3 could limit the authority of the Department of Justice to construe its own regulation. The Department, not the Access Board, has the sole authority to issue binding regulations to implement the statutory provisions at issue here. 42 U.S.C. 12186(b). Therefore, although the Access Board originally drafted the comparable "lines of sight" language that the Department of Justice adopted in Standard 4.33.3, it is the Department's views – not the Access Board's – to which the courts owe deference in determining the meaning of the Department's regulation.

* * * *

APPENDIX D — EXCERPTS FROM REPLY MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE: LINE OF SIGHT ISSUES FILED NOVEMBER 12, 2002

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV-99-01034-FMC (SHx)

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMC ENTERTAINMENT, INC., *et al.*,

Defendants.

REPLY MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT
RE: LINE OF SIGHT ISSUES

DATE: Nov. 18, 2002
TIME: 10:00 a.m.
JUDGE: Hon. Florence-Marie Cooper

Appendix D

* * *

The Department of Justice alone is congressionally-tasked with promulgating binding regulations under Title III of the ADA, and this regulatory authority includes the discretion to "exceed the [Access] Board's 'minimum guidelines' and establish standards that provide greater accessibility." 56 Fed. Reg. 35,408, 35,411 (1991). Pursuant to Congress' delegated regulatory authority, the Department in 1991 issued final regulations — after notice-and-comment rulemaking — to govern new construction of, and alterations to, Title III-covered facilities. *See* US SJ Mem. at 5-6 (discussing DOJ Standards for Accessible Design). *Id.*

Thus, whatever Standard 4.33.3's regulatory and linguistic roots, the interpretation and enforcement of this regulation is now the sole responsibility of the Department of Justice.

* * * *

APPENDIX E — EXCERPTS FROM PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT FILED APRIL 26, 2004

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CIVIL ACTION NO. 1:99CV-705

Hon. Donald C. Nugent

UNITED STATES OF AMERICA,

Plaintiff

v.

CINEMARK USA, INC.,

Defendant

PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR ALL STADIUM-STYLE MOVIE THEATERS WITHIN THE FIFTH CIRCUIT

* * *

Appendix E

ARGUMENT

A. PARTIAL SUMMARY JUDGMENT UNDER *LARA* IS NOT APPROPRIATE AT THIS STAGE OF A PATTERN OR PRACTICE CASE

In order to establish that a "pattern or practice" of discrimination in violation of Title III of the ADA exists, the United States must show that "the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . a company repeatedly and regularly engaged in acts prohibited by the statute." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, n.16 (1977) (citing 110 Cong. Rec. 14270 (1964). Cinemark's many theaters located within the Fifth Circuit constitute part of this "pattern or practice." Discovery about those theaters is necessary to establish that such a pattern or practice of discrimination did in fact occur. The earlier summary judgment decision in this case effectively pre-empted discovery about Cinemark's liability nationwide for ADA Title III violations in failing to provide "comparable lines of sight" for wheelchair seating in Cinemark theaters, leaving the current fact record upon remand almost completely undeveloped. Moreover, nothing in the Sixth Circuit's decision, the briefs filed by the United States in this case, representations at oral argument by counsel for the United States, published opinion, or caselaw, supports Cinemark's specious claim that its stadium-style movie theaters within the Fifth Circuit should be excluded from any liability finding in this case, and, as such, these theaters are appropriately included in the United States' case-in-chief on liability and should be subject to adequate and reasonable discovery by the United States.

Appendix E

In the Sixth Circuit, the United States argued that Cinemark's assertion was premature that summary judgment for its theaters located within the Fifth Circuit was appropriate. *See* United States' Reply Brief in the Sixth Circuit at 18-19 (citing *Peveler v. United States*, 269 F.3d 693, 699 (6th Cir. 2001) (attached as Exhibit 1E). "[T]he law in the Fifth Circuit will become relevant at the ***remedial stage*** if the district court finds Cinemark liable on remand. If *Lara* is still the law of the Fifth Circuit at that time, the district court should not order relief regarding the theaters within that Circuit . . . **But, at the present time, one cannot be sure that *Lara* will still be the law of the Fifth Circuit on the 'lines of sight' issue by the time the district court is ready to enter judgment on remand**." *Id.* (Emphasis added; citations omitted.)

The Sixth Circuit denied Cinemark's request to affirm the this Court's grant of summary judgment for all of its theaters located within the Fifth Circuit and agreed with the United States that the *Lara* holding is only relevant at the remedial stage of this litigation, when considering the "scope of relief" for Cinemark's theaters within the Fifth Circuit. Cinemark asked the Sixth Circuit to affirm this court's grant of summary judgment for all of its stadium-style theaters within the Fifth Circuit. *Cinemark*, 348 F.3d at 584. The Sixth Circuit, making short shrift of Cinemark's argument, stated "[t]his pertains to the ***scope of relief***, and therefore is a matter for the district court to decide consistent with the principles of comity." *Id.* (emphasis added); US Opposition, Facts ¶9. This Court should likewise decline Cinemark's invitation to limit review of this case by granting partial summary judgment prematurely.

Appendix E

The Sixth Circuit's opinion and the mandate rule[3] now require that consideration of the effect of the Fifth Circuit's decision in *Lara v. Cinemark* on the instant action be reserved until after a liability ruling on the United States' pattern or practice claims. *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994) (trial court precluded from reconsidering issue expressly or impliedly decided by appellate court). Summary judgment is not only premature at this time, but would violate the mandate rule.

* * * *

3. Under the mandate rule, after an appellate court has remanded a case to a lower court, the lower court must follow the decision that the apellate court has made in the case, unless new evidence or an intervening change in the law dictates a different result. Black's Law Dictionary (7th ed. 1999).